**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SECOND APPEAL No. 243 of 1985**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE R.S.GARG**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**DALWADI JETHABHAI NANUBHAI & 1 - Appellant(s)**
**Versus**
**CHHABILDAS VRAJLAL SONI - Defendant(s)**

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**Appearance :**
MR NAGIN N GANDHI for Appellant(s) : 1 - 2.
NOTICE SERVED for Defendant(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE R.S.GARG**

**Date : 20/09/2006**

**ORAL JUDGMENT**

1. The appeal arises out of Regular Civil Appeal No. 90/82, where under, the learned 3rd Extra Assistant Judge, Ahmedabad (Rural) at Narol, by

his judgment dated 16.1.85 had reversed the judgment and decree dated 14.7.82 passed in Regular Civil Suit No. 73/79 by the learned Civil Judge (J.D.), Dhandhuka and decreed the plaintiff's suit against the defendant for payment of the suit sum with interest.

2. Short facts necessary for disposal of the appeal are that the plaintiffs filed the suit submitting inter alia, that after striking a balance and understanding the correctness of the same, the defendant, vide exh. 21 gave a writing in favour of the plaintiffs and accordingly accepted the liability to pay. The defendant appeared in the court and denied his liability. After recording the evidence and hearing the parties, the learned trial court dismissed the suit which persuaded the appellants to take the matter in appeal. The learned first appellate court, after hearing the parties, observed that the writing in dispute [exh.21] could be treated to be a pro note, inspite of non-examination of the witness who attested the thumb impression, he held the writing to be proved and decreed

the suit.

3. The defendant, being aggrieved by the said judgment and decree is before this Court. The appeal has been admitted for hearing the parties on 30.1.85 on the following substantial questions of law.

[A] That, without examining the witness Mohanlal Bhalushanar, who purports to attest the thumb impression of the Defendant No.1, whether the Learned Appellate Judge could have held, proved the execution of Exh.21?

[B] That, when Exhibit 21, purports to be “Baki Khatani Yadi” whether the learned Appellate Judge could have held it to a Promissory Note? If not, whether the learned Appellate Judge could have drawn presumption regarding consideration under Sec.118 of the Negotiable Instruments Act?

[C] That, assuming without admitting that Exhibit 21 is a promissory note, whether the learned Appellate Judge in view of the title to it “Baki Khatani Yadi” and in view

of plaintiff's own admission referred to in last 18 lines from the bottom of Para 33 of the appellate judgment, could have held that the same was for consideration?

[D] That, whether the learned appellate Judge could not have considered the request for grant of installments, when the same was specifically pleaded by defendants in their written statement – Exh.10?”

4. Shri Gandhi, learned counsel for the appellants submits that the learned first appellate court was absolutely unjustified in holding that the document in question was promissory note and it did not require attestation and further erred in holding that even without examination of the attesting witness, document could be held to be proved, his submission is that the suit was rightly dismissed by the trial court and the first appellate court could not interfere in the reasoned judgment delivered by the learned trial court.

5. So far as the first substantial question of law

is concerned, it is to be seen that under the law, an acknowledgment or promissory note is not required to be attested. There would be a distinction in attesting a document and attesting witness or attesting signatures of a person in its verification. In the present case, the witness was not attesting the document, but was attesting a thumb impression and if that be so, non-examination of such witness would not make any difference, because, if on the available evidence the Court can decide the execution of the document is proved, then, it can hold so. The question no.A is answered against the interest of the appellant.

6. So far as the questions no. B and C are concerned, it must be noted that even if the document in dispute is not held to be a promissory note, it would still be admissible in evidence as acknowledgment of the past liability. The first appellate court, even if went wrong in holding that the document was a promissory note, then too, the same would not make much difference in the present matter,

because, admissibility of the document was not challenged at the time of its production in evidence and secondly, even if it is held not to be a promissory note, it can still serve the purpose if it is termed to be an acknowledgment. So far as the question no.D is concerned, it has lost its efficacy, because, in an appeal of 25th April, 1985, almost after 21 years, the judgment debtor-defendant would not be entitled to claim installment specially when he had 21 long years to discharge the liability. The appeal deserves to and is accordingly dismissed. No costs. Let a decree be framed accordingly.

**[R.S. GARG, J.]**

**pirzada/-**